IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2895 OF 2007

Smt.Nemavati Brjibihare Gupta ...Petitioner

vs.

Sandeep Devendrakumar Agrawal & Ors. ...Respondents

Mr.S.M.Gorwadkar for the Petitioner
Mr.Navin Chomal for the Respondents.

CORAM: A.S.OKA,J.
DATE : MAY 4,2007.

P.C.:

1. Heard Shri Gorwadkar for the Petitioner and Shri Chomal for the Respondents. Shri Chomal states that he will file Vakalatnama within a period of four weeks from today.

2. Considering the fact that the Writ Petition arises out of a dispute relating to the custody of a minor child, by consent of the Advocates appearing for the parties, the Petition is forthwith taken up for final hearing.

3. An application was made by the Respondents herein under section 25 of the Guardian and Wards Act,1890 before the District Judge, Nashik for the custody of the minor child. The minor is a male child by the name Chirag born on 20th May 2001. The first Respondent is the father of the child and the second and third Respondents are the paternal grandparents of the child and the fourth Respondent is the uncle of the child. The first Respondent married to one Dolly on 16th April 2000. The dispute arose after the demise of the said Dolly. The

Petitioner is the mother of the said Dolly. The prayer in the application made by the respondents is for handing over custody of the minor child. By the Judgment and Order dated 5th December 2005, the learned 4th Ad hoc Additional District Judge, Nashik allowed the said Application filed by the Respondents and directed that the custody of the minor child shall be handed over by the Petitioner to the respondents. The said Application proceeded ex-parte as the Petitioner did not appear before the Court.

4. The Petitioner filed an Application for setting aside the said order. There was a delay in filing the said Application. Therefore, a separate application for condonation of delay was filed by the Petitioner. By the impugned Judgment and Order dated 2nd February 2007, the said Application for condonation of delay has been rejected.

5. The submission of the learned Advocate for the Petitioner is that the learned Trial Judge ought to have taken a liberal view of the matter considering the fact that a drastic order was passed for disturbing the custody of the Petitioner of the minor child. He submitted that the learned Trial Judge ought to have condoned the delay and ought to have restored the application filed by the Respondents.

6. The learned Advocate for the Respondents invited my attention to the order dated 20th June 2006 passed by the

learned Ad hoc Additional District Judge, Nashik on an application for execution of the Judgment and Order dated 5th December 2005 filed by the respondents. He pointed out that under the said order an Advocate has been appointed as a Court Commissioner and the respondents were permitted to meet the minor child in the court premises between 3.00 p.m. to 6.30 p.m. on every Tuesday in presence of the Court Commissioner. The learned Advocate for the respondents invited my attention to the various reports submitted by the Court Commissioner. He pointed out that the minor child is very much attached to the first Respondent. He submitted that the report indicates that the attitude of the Petitioner was obstructive and she tried to obstruct the first Respondent when he attempted to meet the minor child. He pointed out that on many occasions the Petitioner did not bring the child to the Court. He also pointed out that the Commissioner has noted about the role played by a third person who accompanied the Petitioner at the time of granting access. He submitted that there was no reason for the Petitioner to remain absent at the time of hearing of the application for custody. He submitted that considering the subsequent conduct of the Petitioner, the Court below was right in rejecting the application for condonation of delay. He submitted that the Petitioner has repeatedly committed breach of the order passed on 20th June 2006.

7. The learned Advocate for the Petitioner submitted that

what has been stated in the reports of the Commissioner is not correct. He stated that on some occasions the Commissioner was not present at the time of giving access. He relied upon the Affidavit of the Petitioner dated 26th April 2007. He stated that the Petitioner has no intention of preventing the first Respondent from meeting the minor child. Today, the Advocate for the Petitioner has filed an Affidavit of Shri Vinod Kishore Sore in which the said Shri Sore has undertaken not to cause any obstruction to the Court Commissioner and to the first Respondent during the period between 3 to 6.30 p.m. on every Tuesday.

8. I have considered the submissions made by the learned Advocates appearing for the parties. It is not in dispute that for quite some time the custody of the minor child is with the Petitioner. The present age of the minor child is approximately six years. It is true that the first Respondent is the natural guardian of the minor child. However, it is well settled position of law that the dispute regarding custody of a minor child cannot be decided only on the basis of the legal rights of the parties. The only paramount consideration in such matters is the welfare of the minor. It is true that notwithstanding the service of Notice of the Application filed by the Respondents, the Petitioner has chosen not to appear. In fact, the report of the Court bailiff is that the Petitioner refused to accept the service of notice. That is the reason why the order dated 5th

December 2005 was passed by the learned Trial Judge directing the Petitioner to hand over the custody.

9. Perusal of the order dated 5th December 2005 shows that the learned Judge did not call the child to the Court and made no efforts to speak to the child for ascertaining his wishes. It is true that the matter could not have decided only on the basis of the interview of the child. However, it was desirable to talk to the child before passing the order. While deciding the application for custody, the learned Judge is required to consider as to what is in the larger interests of the minor child. For deciding the said question it is necessary to give one more opportunity to the Petitioner to contest the application for custody. Considering the fact that by the order dated 5th December 2005 custody of the grandmother was ordered to be disturbed, the learned Trial Judge ought to have adopted a liberal approach while deciding the application for condonation of delay and the Application for setting aside the said order.

11. The learned Trial Judge can be directed to decide the application for custody in a time bound schedule. In the meanwhile, the parties will be bound by order dated 20th June 2006 passed below application at Exh.5 in the execution application. The learned Advocate for the Respondents pointed out that in terms of the aforesaid order, an access is being given to the first respondent to meet the child in a room on

top floor of the building in the District Court, Nashik which houses the lawyers' chambers. He stated that the said building is known as Building no.2. Considering the various reports of the Court Commissioner, it is desirable that the Petitioner should wait outside the said room during the period in which the first Respondent is permitted to meet the minor child.

12. The orders regarding grant of access or visitation rights are never final in the sense that the parties can always apply for modification of the said orders depending upon the change in circumstances. Therefore, in case the first Respondent faces any difficulty in enforcing the said order, it is always open for the first Respondent to apply to the trial court for issuing appropriate directions or for making an appropriate modification in the said order. Suffice it to say that the first respondent being the father of the child must be given a reasonable opportunity to meet the child at regular intervals. The reports of the Commissioner prima facie indicate that the child is comfortable in the company of the father. During the pendency of the application it will be always open for the learned Trial Judge to take assistance of a child psychologist or a Psychiatrist.

13. Hence, I pass the following order :

i) The order dated 5th December 2005 passed by the learned

Ad hoc Additional District Judge, Nashik is quashed and set aside and Misc.Application No.150 of 2005 is restored to the file. Parties are directed to appear before the learned Trial Judge on 4th June 2007 at 11.00 a.m. If the learned Trial Judge i.e. IV Ad-hoc Additional District Judge is not available, the parties will appear before the Principal District Judge, Nashik. On 4th June 2007, the Petitioner will file a reply to the said Application. No further time will be granted to the Petitioner to file a reply.

ii) During the pendency of the said application, the order dated 20th June 2006 passed below application at Exh.5 in Regular Darkhast No.1 of 2006 will continue to operate as an interim order. Access to meet the minor child will be granted to the first Respondent in a room on the fourth floor of building No.2 of the District Court, Nashik in presence of the same Court Commissioner during the period from 3.00 to 6.30 p.m. on every Tuesday. The Petitioner will not enter the said room and will wait outside the said room to ensure that no obstruction is created while the the respondent no.1 meets the child. It is made clear that no person accompanying the Petitioner will be permitted to enter the said room.

iii) It is always open for the parties to apply for

modification of the interim order dated 20th June 2006 with a view to ensure that the proper and effective access is granted to the Respondent No.1 to meet the minor child.

iv) Statements made in the Affidavit of the Petitioner as well in the Affidavit of Shri Vinod Kishore Sore are accepted.

v) The learned Trial Judge will dispose of the Misc.Application No.150 of 2005 as expeditiously as possible and preferably on or before 31st August 2007.

vi) It is made clear that the Petitioner will not seek any adjournment on any unreasonable ground and will cooperate for early disposal of the said application.

vii) All contentions of the parties on merits of the said application are expressly kept open.

viiA) The Writ Petition is accordingly disposed of.

viii) The concerned Court to act upon an authenticated copy of this order.

ix) Writ to be sent immediately.

JUDGE